18 July 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Senior Airman (E-4) WILLIAM J. ST. BLANC USAF, *Appellant.*	)))))))))	APPELLEE'S BRIEF ON SPECIFIED ISSUE Crim. App. Dkt. No. ACM 37206 USCA Dkt. No. 10-0178/AF

ADDITIONAL BRIEF ON BEHALF OF APPELLEE

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	APPELLEE'S BRIEF ON SPECIFIED ISSUE
v.	)	
	)	Crim. App. Dkt. No. ACM 37206
Senior Airman (E-4) WILLIAM J. ST. BLANC USAF, *Appellant.*	)	USCA Dkt. No. 10-0178/AF

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

SPECIFIED ISSUE

IN LIGHT OF UNITED STATES V. BEATY, DID APPELLANT MAKE A KNOWING AND VOLUNTARY FORUM CHOICE EVEN THOUGH THE MILITARY JUDGE ANNOUNCED THE WRONG MAXIMUM PUNISHMENT FOR POSSESSION OF "WHAT APPEARS TO BE" CHILD PORNOGRAPHY?

STATEMENT OF THE CASE

Appellant's Statement of the Case from his original brief is accepted.

Since that filing, this Court ordered additional briefs to address "whether Appellant waived his right to a trial by court members based on the misapprehension of the maximum punishment." United States v. St. Blanc, __ M.J. __ No. 11-179 (C.A.A.F. Dailey Journal 1 June 2011).

STATEMENT OF FACTS

Appellant was caught in an online undercover investigation conducted by the Washington State Patrol Missing and Exploited

Children Task Force. See United States v. St. Blanc, ACM 37206, (A.F. Ct. Crim. App. 21 Oct. 2009); (Jt. App. at 2). A civilian detective pretending to be a 13-year-old girl, with the screen name "swtmandygal13," engaged in at least three conversations with Appellant, in which "swtmandygal13" informed Appellant that she was only 13 years old. (Id.) Appellant repeatedly made sexually explicit comments during these online conversations. (Id.)

Appellant was charged with: one specification of attempted indecent language to a person believed to be under the age of 16, Article 80, UCMJ; one specification of attempted indecent liberties with a person believe to be under the of 16, Article 80, UCMJ; and two specifications of wrongful and knowing possession of what appeared to be child pornography in violation, Article 134. (Jt. App. at 7-9.) Based on the charges, the maximum punishment the accused faced was 29 years.[1] Prior to arraignment on these charges, the military judge advised Appellant of his forum rights and ensured Appellant

[1] At the time of Appellant's general court-martial, the maximum punishment Article 80, attempt to commit an indecent liberty with a child under 16 years of age was 7 years. Manual for Courts-Martial, part IV, para. 87(e) (2005) (MCM). The maximum punishment for Article 80, attempt to communicate indecent language with a child under the age of 16 years was 2 years. MCM, part IV, para. 89(e)(1) (2005). At the time of Appellant's court-martial, the military judge calculated the maximum confinement for Article 134, possession of "what appears to be" child pornography was 10 years. The calculation of 29 years is based on the two specifications of Article 134 being merged for sentencing purposes.

understood those rights. (R. at 7-10, *available at* Appendix.)[2] Appellant then orally waived his right to trial by court members and requested in writing to be tried by military judge alone. (R. at 7-10; App. Ex. I, *available at* Appendix.)

After extensive motions practice, the military judge merged the two specifications of knowing and wrongful possession of what appeared to be child pornography, which created one specification of wrongful and knowing possession of what appears to be child pornography. (Jt. App. at 22-28.) Appellant entered pleas of not guilty to all charges. (App. Br. at 2-3.)

During the government findings case, Mr. St. Pierre, the DCFL examiner who conducted the analysis of the seized media testified. (Jt. App. at 41.) Mr. St. Pierre testified that the initial analysis of the seized media revealed a total of 28 images of suspected child pornography. (Jt. App. at 43.) The images included depictions of a young female performing fellatio on an adult male, a child sitting on the penis of an adult male, a naked young female blindfolded and hanging from her wrists, an adult male placing his penis against the opening of an infant's vagina, a movie of an adult female performing oral sex on a

[2] The government has placed these four additional pages from the record of trial into an appendix to this additional brief for the convenience of this Court as the joint appendix was already filed.

child, and a movie of an adult male having intercourse with a young female. (Jt. App. at 46-57.)

Mr. St. Pierre also testified about common online search terms for child pornography. Many of the common search terms –- such as “P-T-H-C” (which stands for “preteen hardcore”), “gay pedo” (“pedo” stands for “pedophile”), “pedo,” “pedo rape,” and “birthday girl” –- were found on Appellant’s computer, along with an internet file sharing program. (Jt. App. at 58, 66-67.)

The military judge found Appellant guilty of Article 80, attempt to communicate indecent language to person he believed was under the age of 16 years and Article 134, possession of child pornography. Appellant was found not guilty of Article 80, attempt to commit an indecent liberty with a person he believed was under the age of 16 years.

Based on the findings, the military judge determined the maximum confinement was 12 years and a dishonorable discharge was authorized. (Jt. App. at 81-82.) Trial defense counsel did not object to the military judge’s computation of the maximum sentence. (Jt. App. at 82.) The military judge sentenced Appellant to only two years confinement, a bad conduct discharge, reduction to E-1 and forfeiture of all pay. (Jt. App. at 82.)

ARGUMENT

APPELLANT MADE A KNOWING AND VOLUNTARY WAIVER OF TRIAL BY MEMBERS AS A MISAPPREHENSION OF THE MAXIMUM SENTENCE HAS NO BEARING ON AN INTELLIGENT WAIVER OF SAID RIGHT.

Standard of Review

Whether an appellant knowingly and voluntarily waived a constitutional right, such as to trial by court members, is a question of law that an appellate court independently reviews de novo.[3] *See* Arizona v. Fulminante, 499 U.S. 279, 287 (1991); United States v. Martinez, 38 M.J. 82, 86 (C.M.A. 1993)

Law and Analysis

a. Appellant made a knowing and voluntary waiver of trial by court members as a misapprehension of the maximum punishment has no bearing on an intelligent waiver of said right.

The Sixth Amendment provides that an accused shall enjoy the right to a trial by an impartial jury. U.S. Const. amend. VI. An accused may waive this constitutional right through "express and intelligent consent." In Patton v. United States,

[3] Appellant argues the plain error standard is one of "arguably two standards at issue in this case." (App. Additional Br. at 1.) The plain error doctrine, however, is only applicable to rights that can be forfeited by failure to make a timely assertion. United States v. Olano, 507 U.S., 725, 733 (1993); United States v. Gladue, 67 M.J. 311, 313 (2009). The issue for which this Court ordered briefs is waiver of a right to trial by court members, St. Blanc, __ M.J. __ No. 11-179 (C.A.A.F. Daily Journal 1 June 2011), not "to determine if the trial judge's deliberation under an incorrect maximum punishment entitles Appellant to sentence relief." (App. Br. at 1.) As the constitutional right to trial by jury cannot be forfeited, plain error is not an appropriate standard by which to review this case. *See* Patton v. United States, 281 U.S. 276, 312 (1930) (requiring an *express* waiver to the right to trial by jury).

281 U.S. 276 (1930), the Supreme Court emphasized the need for the "express and intelligent consent of the defendant" to waive the right to be tried by a jury. Id. at 312. Under the Uniform Code of Military Justice, this constitutional right and ability to waive is codified in Article 16. This article provides for a court-martial consisting of members or a military judge alone if "before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves." Article 16, U.C.M.J.

Waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). "And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." Adams v. United States ex rel. McCann, 317 U.S. 269, 278 (1942) (holding an accused can waive trial by jury even against counsel recommendation). According to the discussion of Rule for Courts-Martial 903, a military judge should ordinarily "inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding." R.C.M. 903 (b)(2)(A) Discussion. "Failure to do so is not

error, however, where such knowledge and understanding otherwise appear on the record." Id.

If an appellant asks for a determination of guilt to be set aside after waiver of trial by court members, appellant bears "the burden of showing essential unfairness [was] sustained by him who claims such injustice and seeks to have the result set aside." Adams, 317 U.S. at 281. An appellant must meet his burden "not as a matter of speculation but as a demonstrable reality." Id. As the Supreme Court so aptly stated, "[s]imply because a result that was insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it." Id.

Whether a waiver is "knowing" hinges upon the accused understanding the *specific* right he is abandoning. For example, when waiving a right to a trial, an accused must understand the rights to which he would be entitled at trial and have "sufficient awareness of the . . . likely consequences" of his plea of guilty. Schneckloth v. Bustamonte, 412 U.S. 218, 237-38, n. 25 (1973) (citing McMann v. Richardson, 397 U.S. 759, 766 (1970)). Similarly, an individual must receive detailed Miranda warnings in order to make a knowing waiver of his or her right against compulsory self-incrimination. Id. at 240 (citing Miranda v. Arizona, 384 U.S. 436, 466 (1966)). Such warnings

are tailored to the specific right the individual is abandoning in order to show a knowing and intelligent waiver of such right.

Appellant's cited caselaw under his "knowing and voluntary waiver standard" section relies solely on cases involving waivers of an accused's right to a trial. (App. Additional Br. at 2.) Caselaw makes clear that "a plea of guilty may be improvident because it is predicated upon a substantial misunderstanding on the accused's part of the maximum punishment to which he is subject." United States v. Poole, 26 M.J. 272, 274 (C.M.A. 1988). The applicability of knowing the maximum sentence for a knowing waiver of trial by jury, however, is fundamentally different that a knowing waiver of a right to trial at all.

When waiving a right to trial by court members, an accused must simply understand the choice before him: "to be judged by a group of people from the community, and on the other hand, to have his guilt or innocence determined by a judge." United States ex rel. Williams v. DeRobertis, 715 F.2d 1174, 1180 (7th Cir. 1983). In Williams, the Seventh Circuit Court of Appeals rejected the notion that the accused must understand or even be aware of his ability to participate in the selection of jurors or that conviction would require a unanimous decision of jurors. Id. at 1177, 1181. So long as an appellant had "a concrete

understanding of [his] choice, he was in a position to determine whether an invocation of his right to a jury trial was necessary to effectuate its purpose." Id. at 1180. Exhaustive knowledge of issues outside of the core purpose of trial by members[4] or the fundamental choice the accused must make when waiving trial by court members is not necessary to a knowing waiver. Id.

Put simply, the potential maximum sentence an accused faces is not a part of the fundamental purpose or choice of waiving trial by court members. Whereas a military judge discusses the forum rights with the accused prior to arraignment, the military judge informs the accused of the maximum sentence *after* arraignment either prior to the acceptance of a guilty plea, or after findings are announced and sentencing instructions are given. *Compare* Dept. of Army Pamphlet 27-9, *Military Judges' Benchbook,* para. 2-1-2 *with* para. 2-15-19. This makes logical sense as the maximum sentence an accused faces may vary from the time at which he chooses his forum and the time he faces

[4] The purpose of jury trials, or in the case of courts-martial trial by court members, is "to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge.' Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence. Williams v. Florida, 399 U.S. 78, 100 (1970) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

sentencing depending upon which, if any, charges he is found guilty. Furthermore, for a military judge alone trial, the accused is not required to be informed of the maximum sentence at all. *See* id. chapter 2, section IV.[5]

As such, this Court should limit its inquiry to whether Appellant understood the choice before him and made a knowing waiver of his right to trial by court members. Based on the record of trial, it is abundantly clear that Appellant made a knowing waiver of his right to trial by court members. (R. at 8-10, *available at* Appendix.) The military judge went over Appellant's forum choices in detail--pointing out the ability for Appellant to request enlisted members as part of his panel, discussing how members vote by secret written ballot, and explaining that two-thirds of members must agree to a finding of guilty on any offense. (Id. at 7-8.) The military judge also detailed how court members would have to agree on a sentence of confinement of less than ten years and more than ten years. (Id. at 8.) The military judge also explained Appellant's right to request trial by military judge alone. (Id.) Appellant affirmatively told the military judge that he understood the

[5] Although not required, in this case the military judge did inform Appellant of the maximum sentence after findings and prior to announcement of the sentence. Jt. App. at 81-82. Based on the hindsight provided by the subsequent ruling of United States v. Beaty, 70 M.J. 39 (C.A.A.F. 2011), this maximum sentence was incorrect.

differences between trial before members and trial before military judge alone and that he understood all of his choices. (Id. at 8-9). The military judge then went through the written request for trial by judge alone, ensuring that Appellant had signed the form and specifically understood the form when requesting to be tried by military judge alone. (Id. at 7-10; App. Ex. I.) Furthermore, the military judge confirmed Appellant knew that she would be the military judge prior agreeing to request trial by judge alone. (R. at 9-10.) As indicated in defense counsel's declaration, who the military judge was and her reputation as "fair and if anything somewhat lenient in punishment" bore great weight in Appellant's decision to waive his right to trial by court members. (Maj Shawn Cline's Declaration, 3 June 2009, *available at* Appendix to App. Additional Br.)

Based on the steps taken by the military judge, the Appellant understood his choice and made a knowing, intelligent waiver. Appellant argues now that "had he known the actual maximum punishment he would have elected trial by members" and that the "maximum sentence was a substantial factor in his decision to waive his right to a jury trial." (App. Additional Br. at 2, 3.) Appellant, however, makes no assertion that he did not understand his forum selection choices or that he was

coerced[6] into making his choice. Similar to the appellant in United States v. Gray, there is "no question in this case that appellant understood his choice of forum rights and he voluntarily exercised it." 51 M.J. 1, 29 (1999). As in Gray, the military judge here explained his rights, Appellant acknowledged understanding his rights, and Appellant requested his forum choice both orally and in writing. *Compare* id. *with* R. at 8-10. Further, the military judge went far beyond the facts in Williams where the judge did not explain how the voting process worked for findings or sentencing. *Compare* United States ex rel. Williams v. DeRobertis, 715 F.2d at 1177 *with* R. at 8-10.

Accordingly, this Court should find Appellant made a knowing and voluntary waiver of his right to trial by court members.

b. Assuming, *arguendo,* this Court finds Appellant's waiver was not made knowingly, this error is procedural, not structural; therefore, Appellant must show that he was materially prejudiced.

Even if this Court determines Appellant did not knowingly waive his right to trial by court members, Appellant is not entitled to relief as he has made no showing of material

[6] Allegations of coercion would require this Court to determine whether Appellant "voluntarily" waived his constitutional right to trial by jury. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 238, n. 25 (1973) (citations omitted). As Appellant has made no claims of coercion, the voluntariness of Appellant's waiver is not in question.

prejudice. If this Court finds a misapprehension of the maximum punishment leads to an unknowing waiver of trial by court members, such an error was procedural -- not structural.

"Structural errors involve errors in the trial mechanism" so serious that "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991). This Court maintains a "strong presumption" against structural error and declines "to find it unless the error is of such a nature that its effect is 'difficult to assess' or harmlessness is irrelevant." United States v. McMurrin, 70 M.J. 15, 19 (C.A.A.F. 2011). Here any misapprehension of the maximum sentence in no way undermined the ability of the trial to function as a vehicle for determination of guilt or innocence; as such, if this Court finds the waiver of trial by court members to be problematic, the Court should consider this a procedural error. *See* United States v. Morgan, 57 M.J. 119, 122 (C.A.A.F. 2002).

Where an error is procedural rather than structural in nature, this Court will test for prejudice to determine whether relief is warranted. United States v. Wichmann, 67 M.J. 456, 463 (2009). In this case, Appellant has not alleged nor suffered any prejudice. Appellant was tried by a military judge

who found him not guilty of the second specification of one charge and merged two specifications of the second charge for purposes of findings. The military judge fairly and impartially heard the evidence and convicted Appellant. The record as a whole makes it clear that the selection was Appellant's choice and any error did not materially prejudice Appellant. United States v. Turner, 47 M.J. 348, 350 (C.A.A.F. 1997).

CONCLUSION

WHEREFORE, this Court should affirm that Appellant made a knowing and voluntary waiver of his right to trial by court members.

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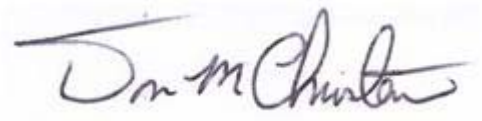

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Colonel Eric Eklund, Chief, Appellate Defense Division, on 18 July 2011, via electronic filing.

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APPENDIX

sexually explicit conduct, in violation of the Uniform Code of Military Justice, Article 134.

ATC: The charges were preferred by Lieutenant Colonel David Yockey, and forwarded with recommendations as to disposition by the same and Colonel Thomas Sharpy, the special court-martial convening authority, and investigated by Lieutenant Colonel Joseph Banna.

Your Honor, are you aware of any matter which might be a ground for challenge against you?

MJ: I am not. Does either side desire to question me or challenge me?

ADC/ATC: No, Your Honor.

Forum Rights Advisement

MJ: Airman St. Blanc, what I'm going to talk to you about next is all of the rights that you have regarding your forum choices. Now you have the right to be tried by a court composed of at least five officer members. Also, because you're a member of our enlisted corps, you could request to have the enlisted members as part of that panel. If you did request to have the enlisted members, then at least one-third of those members would be enlisted. Also, if you requested enlisted members none of the enlisted members would come from your own unit, and none of

the enlisted members would be junior in rank to you. Do you understand what I've stated so far in this regard?

ACC: Yes, Your Honor.

MJ: If you did elect to be tried by court members -- and "members" are essentially what we call a jury in our military justice system -- then those members would have to vote by secret written ballot. And two-thirds of those members must have to agree before you could be found guilty of any offense. If you were found guilty of any offense, then two-thirds of those members would also have to agree in writing on a sentence. If the sentence included confinement for more than 10 years, then three-fourth of those members would have to agree.

You also have a right to request a trial by military judge alone. And if you made such a request and your request was approved, then there would be no court members and the judge alone would determine whether you are guilty or not guilty. And if you were found guilty, then the judge alone would determine your sentence.

Airman St. Blanc, do you understand the difference between a trial before members and a trial before military judge alone?

ACC: Yes, ma'am.

MJ: Do you understand all of the choices you have this regard?

ACC: Yes, Your Honor.

MJ: Tell me about what type of court you wish to be tried.

ACC: Judge alone.

MJ: And, defense, is there a written request for judge alone?

ADC: Yes, there is, ma'am.

MJ: We'll have that marked as Appellate Exhibit I.

DC: I have marked that as Appellate Exhibit I. It is a 1-page document. I'm handing it to the military judge.

MJ: Thank you.

Airman St. Blanc, do you have a copy of your Request for Trial by Judge Alone?

ACC: Yes, Your Honor.

MJ: And if you look at the very first signature on that document, is that your signature?

ACC: Yes, Your Honor.

MJ: And my name is actually typed into the first paragraph, as well as the signature block at the bottom. What I want to know is, at the time you signed this document or at the time that you made your decision to elect trial before judge

alone, did you know that I was going to be the judge in your case?

ACC: Yes, Your Honor.

MJ: And do you understand that if I approve this Request for Trial by Judge Alone, then you do give up your right to be tried by court composed of members?

ACC: Yes, Your Honor.

MJ: And you understand that if I approve your request, you'll be tried by military judge alone, specifically, me?

ACC: Yes, Your Honor.

MJ: And do you still wish to request trial by judge alone?

ACC: Yes, Your Honor.

MJ: Your request is approved, and I will indicate such on the Appellate Exhibit I. The court is assembled.

[The initial 39(a) Session ended and the court was assembled at 1223 hours, 12 December 2007.]

MJ: And the accused will now be arraigned.

ARRAIGNMENT

ATC: All parties to the trial have been furnished with a copy of the charges. Does the accused want it read?

ADC: Your Honor, the accused waives reading.

MJ: The reading of the charges may be omitted.

The charge sheet was numbered as pages 10.1, 10.2 and 10.3

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE JUDICIARY
IN THE WESTERN CIRCUIT

UNITED STATES	)	
	)	
v.	)	REQUEST FOR MILITARY
	)	JUDGE ALONE
	)	
SRA WILLIAM J. ST. BLANC, JR.	)	8 December 2007
92d Aircraft Maintenance Squadron (AMC)	)	
Fairchild Air Force Base, WA	)	

I, SrA William J. St. Blanc, Jr., am presently the accused in the above-styled case. I have been informed that Lt Col Nancy J. Paul, Military Judge, has been detailed to the court-martial to which the charges and specifications are pending against me and have been referred for trial. After consulting with my defense counsel, I hereby request that the court be assembled with the military judge sitting alone. I make this request with full knowledge of my right to be tried by a court-martial composed of commissioned officers, or should I so request, a court-martial composed of at least one-third enlisted members.

WILLIAM J. ST. BLANC, JR., SrA, USAF
Accused

09 DEC 07
Date

Prior to signing the foregoing request, we fully advised SrA St. Blanc of his right to trial before a court-martial composed of commissioned officers, or should he so request, a court-martial composed of at least one-third enlisted members.

SHAWN M. CLINE, Capt, USAF
Senior Defense Counsel

8 Dec 07
Date

MATTHEW E. DUNHAM, Capt, USAF
Defense Counsel

8 Dec 07
Date

The foregoing request for trial before me alone is hereby (approved) ~~(disapproved)~~.

NANCY J. PAUL, Lt Col, USAF
Military Judge

12 Dec 07
Date

Appellate Exhibit I
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